



ACQUISITION AND
TECHNOLOGY

OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON
WASHINGTON DC 20301-3000

May 10, 2001

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
DIRECTOR, DEFENSE RESEARCH AND ENGINEERING
ASSISTANT SECRETARIES OF DEFENSE
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
DIRECTOR, OPERATIONAL TEST AND EVALUATION
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTOR, ADMINISTRATION AND MANAGEMENT
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Section 2667 of Title 10, United States Code: Enhanced-Use Leasing

The purpose of this memorandum is to distribute OSD policy regarding recent amendments to section 2667 of title 10, United States Code. These amendments contain several enhancements to previous authorities that greatly improve the opportunity for the Military Services to outlease real property and facilities on military installations and the benefits they can obtain therefrom.

Section 2812 of H.R. 5408, the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 (House Report 106-945), enacted into law by Public Law 106-398, significantly revised section 2667, particularly in its treatment of in-kind consideration. The law still requires the lessee to pay, in cash or in-kind, consideration in an amount that is not less than the fair market value of the lease interest, as determined by the Service Secretary. However, Section 2812 expands the categories of in-kind consideration that the Service Secretary may accept in lieu of cash for the property leased, to include the construction of new facilities. Further, the Service Secretary may now accept in-kind consideration for any property or facility under the control of that Service, rather than just at the installation where the property was leased. Cash proceeds are still subject to further appropriation, but they are now available for an expanded variety of base operating support functions including the construction or acquisition of new facilities.

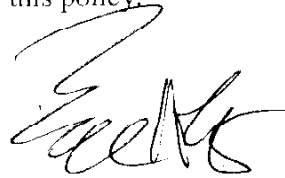
These enhancements provide the Military Services with exceptional tools to maximize the utility and value of our underused real property assets. The ability to spend cash consideration on a greatly expanded list of base operating support functions, including construction, and the ability to accept a greater array of in-kind services, creates many new and innovative out-leasing opportunities. Examples of these opportunities include, but are not limited to, the creation of new or joint-use opportunities for office space, warehouses,



quarters, vehicle test tracks, wind tunnels, energy generation plants, recreational playgrounds, sports venues, etc. Additional benefits can accrue by accepting base operating support or demolition services as in-kind consideration; thereby, reducing the appropriations needed to fund those activities. Finally, the enhancements to section 2667 also provide opportunities to make better use of historic facilities and improve their preservation as both cash and in-kind consideration may be used for those purposes.

Attachment 1 illustrates two examples of ongoing projects that are utilizing the enhanced-use leasing authorities. Attachment 2 is a chart that illustrates the expanded benefits of the new enhanced authorities vis-à-vis the previous version. Attachment 3 provides guidance and interpretation for each subsection of section 2667, as amended. It does not include guidance for the outlease of personal property, other than related personal property included in an outlease of real property.

Please give this policy memorandum its widest dissemination and ensure that installation commanders and their staffs are fully conversant with the enhanced-use leasing authorities so they may capitalize on opportunities where and when they present themselves. Mr. Steven Kleiman, Director, Installation Management, phone: 703-690-0227, email: steve.kleiman@osd.mil is my point of contact for this policy.

A handwritten signature in black ink, appearing to read 'Randall A. Yim', is positioned above the printed name.

Randall A. Yim
Deputy Under Secretary
(Installations)

Attachments

A T T A C H

1

Examples of Ongoing Enhanced-Use Leasing Projects

Portsmouth Naval Shipyard, NH:

The Navy is outleasing a former seven-story prison at Portsmouth Naval Shipyard, NH. This 264,000 square foot historic property, vacant since 1974, will be developed by the lessee for high tech office use. Consideration, for the most part, will be in kind such as the provision of maintenance, repair and improvement of the property and/or the provision of facilities operations and support services. This enhanced-use lease will benefit the Navy by: improving the shipyard's property utilization; reducing the cost of Navy ownership, reducing shipyard man-day rates which include real property overheads; and stimulating the local job market by providing employment for hundreds of new workers.

Fort Sam Houston, TX:

The Army, through a Notice of Availability to Lease, seeks a lessee to work with the Army to develop a business and leasing plan for the use of available real estate assets on Fort Sam Houston, TX. The Army's goal is to identify the most effective and efficient use of the installation's real estate assets to enhance and strengthen the installation's mission objectives. The principal goal of this initiative is to find alternative uses and preserve the historic Brook Army Medical Center (BAMC) and Beach Pavilion complex properties to the greatest extent feasible, in accordance with Sections 110 and 111 of the National Historic Preservation Act, as amended (16 U.S.C. 470h-2 and 470h-3). Both areas are contributing elements to the Fort Sam Houston Conservation District and are eligible for the National Register of Historic Places. The Army proposes to lease these facilities including supporting land and parking areas for fair market value through three separate leases, to provide stewardship of the historic properties, and to the extent possible, defray installation-operating costs.

**A
T
T
A
C
H**

2

Use of Outleasing Proceeds...

Add construction and reduce restrictions

	Cash (Subject to Appropriation)	In-kind
Where	Installation and military department-wide (50-50)	Installation and department-wide (no restriction)
For What	<ul style="list-style-type: none"> ♦ Maintenance ♦ Repair ♦ Restoration, including environmental ♦ New construction ♦ Acquisition ♦ Improvement ♦ Protection ♦ Alteration ♦ Other services 	<ul style="list-style-type: none"> ♦ Maintenance ♦ Repair ♦ Restoration, including environmental ♦ New construction ♦ Acquisition ♦ Improvement ♦ Protection ♦ Alteration ♦ Other services

Items in bold are additions to current authorizations

OSD Policy Subsection by Subsection Analysis

10 U.S.C. 2667, As Amended

(a) Whenever the Secretary of a military department considers it advantageous to the United States, he may lease to such lessee and upon such terms as he considers will promote the national defense or be in the public interest, real or personal property that is—

- (1) Under the control of that department; and*
- (2) Not excess property, as defined by section 3 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 472).*

The only change to this subsection was the deletion of the provision that required a finding that the property was “not for the time needed for public use.” As a result, property that is currently needed to fulfill a service or military mission function may now be outleased to an entity that will provide such needed service(s) or otherwise fulfill a military mission requirement. Property that is no longer required for a current or future military purpose still needs to be reported as excess to higher headquarters, and eventually to GSA, and should not be considered for outleasing.

(b) A lease under subsection (a) -

- (1) May not be for more than five years, unless the Secretary concerned determines that a lease for a longer period will promote the national defense or be in the public interest;*
- (2) May give the lessee the first right to buy the property if the lease is revoked to allow the United States to sell the property under any other provision of law;*
- (3) Shall permit the Secretary to revoke the lease at any time, unless he determines that the omission of such a provision will promote the national defense or be in the public interest;*
- (4) Shall provide for the payment (in cash or in kind) by the lessee of consideration in an amount that is not less than the fair market value of the lease interest, as determined by the Secretary; and*
- (5) May provide, notwithstanding section 321 of the Act of June 30, 1932 (40 U.S.C. 303b), or any other provision of law, for the alteration, repair or improvement, by the lessee, of the property leased as the payment of part or all of the consideration for the lease.*

The only change to this subsection was in Paragraph (5). Paragraph (5) was amended so that its language matched that of section 321, the requirements of which Paragraph (5) waives. In so doing, maintenance, protection, and restoration were eliminated as forms of in-kind consideration as was the ability to perform in-kind consideration on portions of the installation other than those that are the subject of the lease. However, while that language was deleted from Paragraph (5), it was not deleted from the statute as a whole – rather it was moved to subsection (c), which gives a full treatment of in-kind consideration. All leases still have a requirement that

the lessee provide consideration of not less than the fair market value for the leasehold interest. Fair market value shall be determined by an approved appraisal or in the case of a competitive lease, by the high bid. No additional approvals and no additional reporting requirements are required by the revised statute, other than those required by 10 U.S.C. 2662.

(c)(1) In addition to any in-kind consideration accepted under subsection (b)(5), in-kind consideration accepted with respect to a lease under this section may include the following:

(A) Maintenance, protection, alteration, repair, improvement, or restoration (including environmental restoration) of property or facilities under the control of the Secretary concerned.

(B) Construction of new facilities for the Secretary concerned.

(C) Provision of facilities for use by the Secretary concerned.

(D) Facilities operation support for the Secretary concerned.

(E) Provision of such other services relating to activities that will occur on the leased property as the Secretary concerned considers appropriate.

(2) In-kind consideration under paragraph (1) may be accepted at any property or facilities under the control of the Secretary concerned that are selected for that purpose by the Secretary concerned.

(3) Sections 2662 and 2802 of this title shall not apply to any new facilities whose construction is accepted as in-kind consideration under this subsection.

(4) In the case of a lease for which all or part of the consideration proposed to be accepted by the Secretary concerned under this subsection is in-kind consideration with a value in excess of \$500,000, the Secretary concerned may not enter into the lease until 30 days after the date on which a report on the facts of the lease is submitted to the congressional defense committees.

This subsection is new. It provides for the acceptance of in-kind consideration in the forms set forth in (A) through (E). This in-kind consideration may be accepted on any property or facility under the control of the respective Service Secretary that is executing the outlease. The military departments shall develop a formal review and approval process that culminates with the approval of such outleases by the respective military department Deputy Assistant Secretary.

When accepting new facilities as in-kind consideration, it is not necessary to obtain authorization for a military construction project pursuant to 10 U.S.C. 2802 or to comply with the reporting requirement of 10 U.S.C. 2662(a)(1). However, when a lease has an annual rental in excess of \$500,000 (cash or in-kind) the military department must comply with 10 U.S.C. 2662(a)(3). Additionally, where the in-kind consideration being accepted under the authority of subsection (c) has a value in excess of \$500,000, the military department must also comply with subsection (c)(4). In those circumstances that require a report under section 2662(a)(3) and 2667(c)(4), the military department should submit a single report, citing both statutory requirements.

(d)(1)(A) The Secretary of a military department shall deposit in a special account in the Treasury established for such military department the following:

(i) All money rentals received pursuant to leases entered into by that Secretary under this section.

(ii) All proceeds received pursuant to the granting of easements by that Secretary under sections 2668 and 2669 of this title.

(iii) All proceeds received by that Secretary from authorizing the temporary use of other property under the control of that military department.

(B) Subparagraph (A) does not apply to the following proceeds:

(i) Amounts paid for utilities and services furnished lessees by the Secretary of a military department pursuant to leases entered into under this section.

(ii) Money rentals referred to in paragraph (4) or (5).

(C) Subject to subparagraphs (D) and (E), the proceeds deposited in the special account of a military department pursuant to subparagraph (A) shall be available to the Secretary of that military department, in such amounts as provided in appropriation Acts, for the following:

(i) Maintenance, protection, alteration, repair, improvement, or restoration (including environmental restoration) of property or facilities.

(ii) Construction or acquisition of new facilities.

(iii) Lease of facilities.

(iv) Facilities operation support.

(D) At least 50 percent of the proceeds deposited in the special account of a military department under subparagraph (A) shall be available for activities described in subparagraph (C) only at the military installation where the proceeds were derived.

(E) The Secretary concerned may not expend under subparagraph (C) an amount in excess of \$500,000 at a single installation until 30 days after the date on which a report on the facts of the proposed expenditure is submitted to the congressional defense committees.

(2) Payments for utilities and services furnished lessees pursuant to leases entered into under this section shall be credited to the appropriation account or working capital fund from which the cost of furnishing the utilities and services was paid.

(3) Not later than March 15 each year, the Secretary of Defense shall submit to the congressional defense committees a report which shall include -

(A) An accounting of the receipt and use of all money rentals that were deposited and expended under this subsection during the fiscal year preceding the fiscal year in which the report is made; and

(B) A detailed explanation of each lease entered into, and of each amendment made to existing leases, during such preceding fiscal year.

(4) Money rentals received by the United States directly from a lease under this section for agricultural or grazing purposes of lands under the control of the Secretary of a military department (other than lands acquired by the United States for flood control or navigation purposes or any related purpose, including the development of hydroelectric power) may be retained and spent by the Secretary concerned in such amounts as the Secretary considers necessary to cover the administrative expenses of leasing for such purposes and to cover the financing of multiple-land use management programs at any installation under the jurisdiction of the Secretary.

(5) Money rentals received by the United States from a lease under subsection (f) shall be deposited into the account established under section 2906(a) of the Defense Base Closure and Realignment Act of 1990 (part A of title XXIX of Public Law 101-510; 10 U.S.C. 2687 note).

This subsection has not been substantially revised. Proceeds received from outleases in the form of cash are still deposited into an account established in the Treasury. In addition, consideration for easements (granted under the authority of 10 U.S.C. 2668 or 2669) and for any other temporary use under a real estate agreement (permit, license, utility pole agreement, etc.) shall be placed into the same account. After being appropriated the next year, the money will be available for those uses listed in subsection (d)(1)(C). At least half of the money must be returned/used at the installation where the lease, easement or other temporary use was granted.

All approvals for such real estate agreements must comply with military department leasing procedures, as well as statutory reporting requirements. For example, 10 U.S.C. 2667(d)(1)(E) requires a report to the Authorization and Appropriation Committees of Congress before expending an amount in excess of \$500,000 at a single activity. Such reports shall identify the base, the real estate activity that provided the funds and a brief description of the proposed use of the money. Each such report shall be approved by the respective military departmental chain of command up to the respective military department Deputy Assistant Secretary.

Subsection (d)(3) requires the Secretary of Defense to submit a detailed report, by March 15 of each year, that includes an accounting of the receipt and use of all money rentals that were deposited in the Account and expended, and an explanation of each lease entered into under this subsection. This congressional report is similar to the report that has been previously submitted with the President's budget, and will continue to be submitted by each individual military department.

Sections (e), (f), and (g) are unchanged

(h) In this section:

(1) The term 'congressional defense committees' means:

(A) The Committee on Armed Services and the Committee on Appropriations of the Senate.

(B) The Committee on Armed Services and the Committee on Appropriations of the House of Representatives.

(2) The term 'base closure law' means the following:

(A) Section 2687 of this title.

(B) The Defense Base Closure and Realignment Act of 1990 (part A of title XXIX of Public Law 101-510; 10 U.S.C. 2687 note).

(C) Title II of the Defense Authorization Amendments and Base Closure and Realignment Act (Public Law 100-526; 10 U.S.C. 2687 note).

(3) The term 'military installation' has the meaning given such term in section 2687(e)(1) of this title.

Section (h) provides definitions.

(i) This section does not apply to oil, mineral, or phosphate lands.

Section (i) is unchanged.